No. 86-327

In the Supreme Court of the United States

OCTOBER TERM, 1986

MULLINS COAL COMPANY, INCORPORATED OF VIRGINIA, ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether an otherwise eligible claimant for black lung benefits automatically invokes a presumption of compensable disability under 20 C.F.R. 727.203(a) by introducing a single piece of qualifying medical evidence.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-101a) are reported at 785 F.2d 424.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a) was entered on February 26, 1986. A petition for rehearing was denied on April 21, 1986 (Pet. App. 152a-154a). The Chief Justice extended the

time for filing a petition for a writ of certiorari to August 29, 1986 (Pet. App. 155a). The petition was filed on August 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The non-federal respondents are coal miners who filed claims with the Secretary of Labor for black lung benefits. Upon completion of administrative proceedings, their cases were heard by the en banc Fourth Circuit. The court overruled several prior decisions and adopted a new interpretation of the regulations that define the proof scheme for adjudication of the claims at issue. Petitioners, who are coal mine operators and an operator's insurer, challenge the Fourth Circuit's ruling. The federal respondent agrees that the new interpretation is erroneous and that there is a significant conflict among the circuits on the question presented. Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

1. Title IV of the Federal Mine Health and Safety Act of 1969, as amended in 1972, 1977, 1978, and 1981, 30 U.S.C. 901 *et seq.*, establishes a benefit program for coal miners who are totally disabled by pneumoconiosis (black lung disease) arising out of coal mine employment. See generally *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976). Benefits under Part C of the program, which is administered by the Department of Labor, are paid either by coal mine operators or by a special federal government fund, the Black Lung Disability Trust Fund.[1] *Id.* at 10. Respondent Director, Office of

[1] The Black Lung Disability Trust Fund pays benefits where a miner's last coal mine employment ended before

Workers' Compensation Programs, is responsible, by delegation of the Secretary of Labor's authority, for administering the federal fund and Part C of the black lung program. 20 C.F.R. 701.201, 701.202.

Claims for benefits under the program are adjudicated by different agencies and under different regulations depending on the date of filing. Claims filed prior to July 1, 1973 (Part B claims) are adjudicated by the Social Security Administration (SSA) pursuant to regulations codified at 20 C.F.R. Pt. 410. 30 U.S.C. 924, 925. Claims filed on or after that date (Part C claims) are adjudicated by the Secretary of Labor. 30 U.S.C. 925, 931. For Part C claims filed prior to April 1, 1980, the governing standards are the Secretary of Labor's "interim regulations," codified at 20 C.F.R. Pt. 727, which Congress required to be no more restrictive than the SSA regulations for Part B claims (30 U.S.C. 902(f)). Part C claims filed on or after that date are governed by the Secretary's permanent criteria, codified at 20 C.F.R. Pt. 718. 20 C.F.R. 725.4(a).

At issue in this petition are the interim regulations and the proof scheme they establish for adjudicating claims for benefits filed by miners with at least 10 years' coal mine employment. Under that scheme (20 C.F.R. 727.203), such miners need not prove all three elements of a claim (pneumoconiosis, disability, and

January 1, 1970, where a responsible operator cannot be identified, and in certain cases that are reopened after initial denial. 30 U.S.C. 932(c)(1), (2), and (j)(3), 934. The Fund is financed by an excise tax on the sale of coal (see 26 U.S.C. 4121) and has the power to borrow from the United States Treasury when its expenditures exceed its income (26 U.S.C. 9501(c)). The Fund is currently 2.9 billion dollars in debt to the federal treasury.

causation by coal mine employment). Rather, by establishing certain limited "basic facts," they may invoke a presumption of compensable total disability; the employer or Director may then rebut the presumption. Specifically, Subsection (a)[2] provides that a miner who engaged in coal mine employment for at least 10 years is presumed to be totally disabled due to coal workers' pneumoconiosis arising out of that employment if any one of four specified medical evidentiary requirements is met.[3] Subsection (b) provides that the presumption is rebutted if it is shown that the miner is not in fact disabled, that he does not suffer from pneumoconiosis, or that his disability does not arise, even in part, from coal mine employment.[4] The statute (30 U.S.C. 923(b)) requires that "all relevant evidence" be considered "where relevant" in adjudicating claims, and Subsection (b) mirrors that requirement.

2. All three cases below began when the non-federal respondents, who are miners or former miners, filed claims for benefits with the federal respondent. Each claim was initially decided by the Office of Workers' Compensation Programs' Deputy Commissioner. 20 C.F.R. 725.418, 725.419. In each case, the non-prevailing party requested a hearing

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[2] Unless otherwise indicated, "Subsection —" refers to a subsection of 20 C.F.R. 727.203.

[3] 20 C.F.R. 727.203(a) states:

> * * * A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);
>
> (2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than [specified] values * * *
>
> (3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than [specified] values * * *
>
> (4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment; * * *.

Subsection (a)(5), which provides for lay evidence in the case of a deceased miner where no medical evidence is available, is not at issue in this petition.

[4] 20 C.F.R. 727.203(b) states:

> * * * In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:
>
> (1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
>
> (2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
>
> (3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or
>
> (4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

before an administrative law judge (ALJ) (see 20 C.F.R. 725.419(a), 725.451), who rendered a decision after receiving further evidence (see 20 C.F.R. 725.476, 725.477). In respondent Stapleton's case, the ALJ invoked the presumption based on a single positive X-ray but then found the presumption rebutted (Pet. App. 106a-117a). In respondent Ray's case, the ALJ refused to invoke the presumption, weighing the evidence and finding it unpersuasive in any of the categories (Pet. App. 125a-134a). In respondent Cornett's case, the ALJ invoked the presumption based on the weight of the evidence in three categories and then found the presumption unrebutted (Pet. App. 141a-151a).

The ALJ decisions were appealed to the Benefits Review Board, which reviewed them for substantial evidence and conformity with law (see 30 U.S.C. 932(a)—incorporating 33 U.S.C. 921(b)(3)) and affirmed in all three cases. In Stapleton's case, the Board affirmed the ALJ's ruling but held that the presumption should not have been invoked based on a single piece of evidence (Pet. App. 102a-105a). In Ray's case, the Board affirmed the ALJ's finding that Ray was not entitled to the presumption (Pet. App. 118a-124a). In Cornett's case, the Board affirmed the ALJ's invocation of the presumption and finding of no rebuttal (Pet. App. 138a-140a, 135a-137a).

3. The unsuccessful parties before the Board filed petitions for review in the Fourth Circuit. The court of appeals *sua sponte* ordered that the three cases be consolidated and heard *en banc* (Resp. App. 1-3). The court directed the parties to address two questions regarding the proper interpretation of the interim regulations: whether a claimant could invoke the presumption with a single piece of "qualifying"

medical evidence;[5] and whether, and if so to what extent, non-qualifying medical evidence could rebut the presumption. The court requested the parties to address these issues in light of its previous panel decisions in *Hampton* v. *United States Dep't of Labor Benefits Review Bd.*, 678 F.2d 506 (4th Cir. 1982), *Consolidation Coal Co.* v. *Sanati*, 713 F.2d 480 (4th Cir. 1983), and *Whicker* v. *United States Dep't of Labor Benefits Review Bd.*, 733 F.2d 346 (4th Cir. 1984).[6]

The Director, who had not participated in the administrative proceedings, intervened in the appeal. The Director argued that a claimant could invoke the presumption only by a preponderance of the medical

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[5] Medical evidence is "qualifying" if it is positive, in the sense that it would suffice, in the absence of any contrary evidence of the same type, to invoke the presumption. For example, an X-ray that disclosed pneumoconiosis or ventilatory studies that revealed a respiratory or pulmonary impairment of the specified magnitude would be qualifying evidence. Negative results on an X-ray or in ventilatory studies would, by contrast, be "non-qualifying."

In addition, as Subsection (a) itself indicates, all medical evidence is subject to regulatory standards for quality. See, *e.g.*, 20 C.F.R. 410.428(a)(1), (b), and (c) (X-ray, biopsy, and autopsy standards) (incorporated in 20 C.F.R. 727.203(a)(1), 727.206(a)); 20 C.F.R. 410.430 (ventilatory study standards) (incorporated in 20 C.F.R. 727.203(a)(2)); Subsection (a)(3) (blood gas study standards).

[6] In *Sanati*, the court agreed with the Director that physicians' reports must be weighed in order to determine whether the presumption should be invoked under Subsection (a)(4). In *Hampton* and *Whicker*, the court placed significant restrictions on the range of permissible rebuttal evidence, ruling that a doctor's opinion based in part upon non-qualifying ventilatory function and blood gas test results constituted "improper rebuttal evidence." 678 F.2d at 508.

evidence in a particular category—for example, by proving the existence of pneumoconiosis by a preponderance of the X-ray, biopsy, and autopsy evidence (under Subsection (a)(1)), or by proving a totally disabling respiratory or pulmonary impairment by a preponderance of the "[o]ther medical evidence" (under Subsection (a)(1)), or by proving a totally argued that, once the presumption was invoked, the burden of persuasion shifted to the employer or Director. He argued that, at the rebuttal stage, non-qualifying medical evidence could be relevant, but only if submitted in support of a reasoned medical judgment. See Pet. App. 84a-87a (opinion of Sprouse J.) (quoting Director's brief). The Director further argued that facts already proven at the presumption stage could not be relitigated at the rebuttal stage, at least not with the same type of evidence.[7]

The court of appeals issued a per curiam opinion announcing the disposition of the three cases before it and referring, for the guiding rules of law, to various combinations of its four lengthy opinions.[8]

[7] For example, proof under Subsection (a)(1) of pneumoconiosis based on X-ray, biopsy, and autopsy evidence implies that the existence of pneumoconiosis may not be relitigated at the rebuttal stage, at least not without introducing relevant evidence other than X-ray, biopsy, or autopsy evidence. See Pet. App. 37a-40a (opinion of Phillips, J.) (summarizing Director's position).

[8] The court split into three groups. One group (Chief Judge Winter, Judge Hall, Judge Sprouse, and Judge Sneeden) was represented in two opinions—one by Judge Hall (Pet. App. 5a-33a), a second by Judge Sprouse (Pet. App. 56a-92a). A separate group of four judges expressed its views in an opinion by Judge Phillips (Pet. App. 34a-55a), which Judges Russell, Murnaghan, and Ervin joined. A third group expressed its views in an opinion by Judge Widener (Pet. App. 93a-101a), which Judges Chapman and Wilkinson joined.

The first and third groups formed the majority on the invocation issue. The second and third groups formed the majority on the rebuttal issue.

The majority rejected the Director's preponderance standard and held that an otherwise eligible claimant needs to produce only one credible piece of qualifying evidence in any of the four categories specified in Subsection (a) to invoke the presumption of compensable disability (Pet. App. 3a).[9] A different majority held that all relevant medical evidence could be considered on rebuttal, including non-qualifying test results, subject only to the statutory limitation (30 U.S.C. 923(b)) that a single negative X-ray may not be the basis for denying benefits (Pet. App. 4a); this holding rejected the Director's view that non-qualifying evidence (*e.g.*, negative X-rays) should be admitted only in support of a reasoned medical opinion (see Pet. App. 25a-27a (opinion of Hall, J.)).

[9] The majority noted one exception, arising under Subsection (a)(4). Although a single qualifying physician's report suffices to invoke the presumption, in the absence of such a report, all other medical evidence must be weighed to determine if the presumption may be invoked under that subsection (Pet. App. 3a). Four of the judges who advocated this result agreed with the Director that the evidence in all categories should be weighed before the presumption is invoked (*id.* at 51a (opinion of Phillips, J.)); the three additional members of the court who concurred in this result apparently believed that the regulatory language, which requires invocation if "[o]ther medical evidence * * * establishes the presence of a totally disabling respiratory or pulmonary impairment," imposes by its plain terms a burden of persuasion (*id.* at 96a-97a (opinion of Widener, J.)).

Nevertheless, all the judges agreed with the Director that the rebutting party bears the burden of persuasion on rebuttal (see Pet. App. 4a; *id.* at 23a-25a (opinion of Hall, J.)).[10] Because the two divided holdings departed from the court's previous panel decisions, the court overruled the three panel decisions it had asked the parties to discuss when it set the cases for en banc hearing (see page 7, *supra*).

The court's holding that a claimant can generally invoke the presumption by a single qualifying test result—the ruling challenged in the petition before this Court—derives from three separate opinions. The majority pointed to the regulatory language and structure in support of its interpretation (see Pet. App. 20a, 23a (opinion of Hall, J.), 97a (opinion of Widener, J.)): for example, Subsection (a)(1) provides that the presumption is invoked if "[a] chest roentgenogram * * * establishes the existence of pneumoconiosis" (emphasis added); and the requirement that "all relevant medical evidence shall be considered" is included in Subsection (b), governing rebuttal, not Subsection (a), governing invocation of the presumption. One group in the majority also concluded that the Director's approach, by generally foreclosing relitigation at the rebuttal stage of facts established at the presumption stage, would violate the statutory and regulatory command that all relevant evidence be considered (see Pet. App. 21a (opinion of Hall, J.), 71a & n.10 (opinion of Sprouse,

[10] The court unanimously agreed with the Director (Pet. App. 29a-32a) that 20 C.F.R. 725.608(a) requires a liable coal mine operator to pay interest on past-due benefits accruing from the thirtieth day after the first agency decision granting the claim. That aspect of the court's decision is not at issue here.

J.)).[11] Finally, the majority concluded that a preponderance-of-the-evidence requirement would frustrate congressional intent to facilitate miners' efforts to prove their claims (Pet. App. 70a, 77a-83a (opinion of Sprouse, J.), 94a (opinion of Widener, J.)). The majority thus viewed the Director's interpretation as unreasonable (Pet. App. 17a-18a (opinion of Hall, J.)) and refused to defer to it.[12]

A minority of the court agreed with the Director that a claimant should be required to prove the facts necessary to invoke the presumption in any of the categories by a preponderance of the evidence (Pet. App. 34a-55a (opinion of Phillips, J.)). The minority urged deference to the Director's interpretation as a permissible reading of the regulation that is consistent with the statute (*id.* at 36a). Noting "the range of arguably reasonable interpretations that are possible with respect to the details of a regulation" such as this one, the dissenters found deference to the administrative interpretation essential "to encourage national uniformity of application" (*id.* at 36a n.2). They also relied on the regulation's requirement that a claimant "establish" the necessary

[11] The majority further concluded that the Administrative Procedure Act (APA), 5 U.S.C. 554, 556, 559, to the extent it establishes a burden of persuasion, had been superseded by the particular statutory and regulatory scheme for black lung benefits (Pet. App. 22a n.8 (opinion of Hall, J.), 93a (opinion of Widener, J.)).

[12] One group in the majority concluded, moreover, that the Director's position was merely a litigation position (Pet. App. 56a (opinion of Sprouse, J.)). The other group in the majority read the comments of the Secretary upon promulgation of the interim regulations (43 Fed. Reg. 36826 (1978)) as establishing the single-item-of-evidence view as the originally intended meaning and thought this evidence essentially decisive (Pet. App. 94a (opinion of Widener, J.)).

facts to invoke the presumption, just as the rebutting party, which the full court agreed bears the burden of persuasion, must "establish" its case (*id.* at 42a).[13] Finally, the dissenting judges argued that the majority was mistaken in thinking that the Director's interpretation renders the presumption irrebuttable: when a claimant has proved any of the "basic facts" by a preponderance of the evidence in a category (*e.g.*, when the claimant has proved pneumoconiosis by X-ray evidence under Subsection (a)(1)), the operator remains free to rebut the resulting "presumed facts" (*e.g.*, the mine-relatedness and totally disabling effect of proven pneumoconiosis) under Subsections (b)(1), (2), and (3).

Applying its new interpretation of the interim regulations to the three cases before it, the court of appeals first affirmed the Board's denial of benefits (though not its reasoning) in Stapleton's case, concluding that the ALJ properly invoked the presumption and properly found it rebutted (Pet. App. 5a). In Ray's case, the court vacated the Board decision, concluding that the ALJ should have invoked the presumption, and remanded for consideration of rebuttal (*ibid.*). In Cornett's case, the court affirmed the award of benefits, concluding that the presumption was properly invoked and not rebutted, but remanded for calculation of interest (*ibid.*).

DISCUSSION

We do not oppose the granting of the petition for a writ of certiorari. The decision of the court of ap-

[13] The dissenters further asserted that the preponderance standard was not only the usual standard in civil litigation but the standard dictated by the APA where, as here, no other standard was specified (Pet. App. 41a-42a n.6).

peals conflicts with decisions of other circuits, defeating uniformity not only in the courts of appeals but also in the administrative process. The decision will require relitigation of a large number of black lung claims decided in the administrative process under the Director's preponderance standard. We also believe that the rejection of the Director's reasonable interpretation of his own regulations was erroneous.

1. There is a conflict among the Fourth, Sixth, and Seventh Circuits on what proof is required for a claimant to invoke the interim presumption of compensable disability under Part C. The Sixth Circuit, relying on prior case law construing the essentially identical presumption applicable to Part B claims (20 C.F.R. 410.490(b)), has recently reaffirmed its view that a claimant under Part C may invoke the presumption only by a preponderance of the evidence in a particular category and has thus expressly "rejected the plurality view of the Fourth Circuit." *Back* v. *Director, OWCP*, 796 F.2d 169, 172 (1986); see also *Engle* v. *Director, OWCP*, 792 F.2d 63 (1986). The Seventh Circuit apparently takes a view different from both the Fourth and Sixth Circuits. Although the Seventh Circuit only two years ago appeared to adopt the view that a preponderance of the evidence is required at the presumption stage (see *Consolidation Coal Co.* v. *Chubb*, 741 F.2d 968, 972-974 (1984)), the court recently "reject[ed] * * * [the] assertion that the presumption * * * can be invoked only by a preponderance of the evidence" and held that a single qualifying doctor's opinion "permits—although it does not necessarily require" invocation of the presumption. *Amax Coal Co.* v. *Director, OWCP*, 801 F.2d 958, 962 (1986). See also *Kuehner* v. *Ziegler Coal Co.*, 788 F.2d 439, 440 (1986). Without noting so expressly, the Seventh

Circuit in *Amax* thus departed from its own prior practice and took a position contrary to that of the Fourth Circuit here.

This conflict is already significant and will become more so as other courts of appeals address the Fourth Circuit's new standard. See, *e.g.*, *Revak* v. *National Mines Corp.*, No. 86-3211 (3d Cir. argued Oct. 16, 1986). There are over 200 black lung cases pending in the courts of appeals, and most of those involve the interim regulations. Moreover, the Director estimates that the Fourth and Sixth Circuits together consider approximately 60 percent of all black lung litigation in the courts of appeals (35 percent in the Fourth Circuit, 25 percent in the Sixth Circuit). The ruling below thus requires the Benefits Review Board and the ALJs to apply different standards to different claimants, depending on the circuit in which a claim arises, in a large number of cases.

2. The decision below, as the overruling of three Fourth Circuit decisions and the rejection of the Director's position show, is a departure from prior law and administrative practice. The decision will therefore require administrative reconsideration of a substantial number of cases. The Office of Workers' Compensation Programs estimates that at least 10,000 of the 25,000 pending black lung cases involve the interim presumption. More than a third of those claims arise in the Fourth Circuit. The Fourth Circuit and the Benefits Review Board together have already remanded at least 80 cases for reconsideration in light of the new presumption standard. The added administrative burden undermines the agency's current efforts to reduce the backlog of pending cases this fiscal year.

3. The Director's long-held view of his own interim regulations is a reasonable construction that is

consistent with statutory requirements. As such, it is entitled to judicial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

a. The Director has consistently maintained, since the promulgation of the interim criteria in 1978, that all like-kind evidence (*i.e.*, all evidence of the type specified in a particular Subsection (a) category—for example, blood gas studies in category (a)(3)) must be weighed in determining whether the claimant has met one of the four medical evidentiary requirements in Subsection (a) and is therefore entitled to invoke the presumption. The Benefits Review Board has, consistently, with one temporary exception,[14] reviewed ALJs' determinations regarding invocation of the presumption under a preponderance standard. See, *e.g.*, *Elkins* v. *Beth-Elkhorn Corp.*, 2 B.L.R. (MB) 1-683 (Ben. Rev. Bd. Nov. 7, 1979) (Subsection (a)(1)); *Strako* v. *Ziegler Coal Co.*, 3 B.L.R. (MB) 1-136 (Ben. Rev. Bd. May 14, 1981) (Subsection (a)(2)); *Lessar* v. *C.F. & I. Steel Corp.*, 3 B.L.R. (MB) 1-63 (Ben. Rev. Bd. Mar. 31, 1981) (Subsection (a)(3)). Similarly, prior to the Fourth Circuit decision in this case, the courts of appeals had, on numerous occasions, routinely reviewed for

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[14] In *Stiner* v. *Bethlehem Mines Corp.*, 3 B.L.R. (MB) 1-487 (Ben. Rev. Bd. June 30, 1981), the Board concluded that the presumption must be invoked under Subsection (a)(4) if a single reasoned medical opinion establishes the presence of a totally disabling respiratory or pulmonary impairment. The Board subsequently overruled that decision, *Meadows* v. *Westmoreland Coal Co.*, 6 B.L.R. (MB) 1-773 (Ben. Rev. Bd. Jan. 12, 1984), persuaded by the Fourth Circuit's reasoning in *Sanati, supra*.

substantial evidence the factfinder's weighing of the evidence presented by a claimant seeking to invoke the presumption. See, *e.g.*, *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 972-974; *Bozick* v. *Consolidation Coal Co.*, 735 F.2d 1017 (6th Cir. 1984); *Consolidation Coal Co.* v. *Sanati*, *supra*; *Markus* v. *Old Ben Coal Co.*, 712 F.2d 322, 326-327 (7th Cir. 1983). Indeed, as the court of appeals should have been aware, the Director had successfully urged adoption of the preponderance standard under Subsection (a)(4) in *Sanati* in 1982. Thus, it is the Fourth Circuit's reformulation of the evidentiary standard, and not the Director's interpretation of his regulations, that represents a departure from past administrative practice.[15]

b. The Director's interpretation is a permissible construction of the regulatory language. To begin with, as Judge Phillips pointed out (see Pet. App. 46a-47a n.11), the regulation is hardly a model of precise drafting. In any event, the regulatory language easily bears—indeed, strongly supports—the construction that the facts that warrant invocation of the presumption must be proved by weighing the evidence under the preponderance standard.

First, although Subsection (a)(1) speaks of "[a]" chest X-ray, biopsy, or autopsy establishing pneumoconiosis, the other categories expressly use inclusive terms in describing the evidence to be considered—the plural "studies" in Subsections (a)(2) and (3); the general "[o]ther medical evidence" in Subsection (a)(4). Likewise, the reference to "the documented opinion of *a* physician" in Subsection (a)(4) (emphasis added) is made only in a context that seems to require that the opinion be considered among all "[o]ther medical evidence." Most important, each of the four subsections that define methods for invoking the presumption explicitly provides that a presumption of disability is invoked only if specified facts are "establish[ed]" (Subsections (a)(1), (2), and (4)) or "demonstrate[d]" (Subsection (a)(3)). Even a single positive X-ray would not "establish" pneumoconiosis if other like-kind evidence convinced the trier of fact that pneumoconiosis was not likely to be present.[16] For evidence to "establish" a fact,

[15] The Secretary's comments issued in connection with the promulgation of the interim criteria (43 Fed. Reg. 36826 (1978)) do not establish the contrary. The comments are not even addressed to the issue of what standard of proof governs at the presumption stage. We read the comments to assert, at most, only that a single item of qualifying evidence *may* establish the facts necessary to invoke the presumption. Certainly, there is no evidence that the Director or the Benefits Review Board ever understood these comments to require the Fourth Circuit's view.

[16] One court, construing the rebutting party's parallel obligation to "establish" certain facts (Subsection (b)), noted that "[t]he plain meaning of the regulatory language * * * demonstrates that the [party bears a] burden of persuasion." *Alabama By-Products Corp.* v. *Killingsworth*, 733 F.2d 1511, 1514 (11th Cir. 1984). The courts of appeals, including the court below, have unanimously concluded that the rebutting party "establishes" its case only by proving by a preponderance of the evidence that the miner does not have pneumoconiosis, is not disabled, or is not disabled even in part as a result of coal mine employment. See Pet. App. 23a-25a (opinion of Hall, J.); *Kaiser Steel Corp.* v. *Director, OWCP*, 748 F.2d 1426, 1430 (10th Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120, 124 (4th Cir. 1984); *Alabama By-Products* v. *Killingsworth*, 733 F.2d at 1513-1515; *Consolidation Coal Co.* v. *Smith*, 699 F.2d 446, 449 (8th Cir. 1983). See also *Palmer Coking Coal Co.* v. *Director, OWCP*, 720 F.2d

the evidence must be evaluated; and the evaluation process is reasonably construed—indeed, is most reasonably construed—to include all other like-kind evidence.

c. The Director's interpretation of his regulation sets out an orderly and sensible method of considering "all relevant medical evidence" (Subsection (b)). The ALJ must first ascertain whether any evidence supporting invocation of the presumption meets applicable quality control standards. See note 5, *supra*. If such evidence exists, and is uncontroverted, the ALJ is compelled to invoke the presumption of compensable disability. Cf. *Ansel* v. *Weinberger*, 529 F.2d 304, 309 (6th Cir. 1976) (statutory presumption at 30 U.S.C. 921(c)(4)). If the evidence is controverted, the ALJ must focus, as would any other trier of fact, on the relative weight to be accorded each piece of evidence. *Director, OWCP* v. *Rowe*, 710 F.2d 251, 254-255 (6th Cir. 1983); *Peabody Coal Co.* v. *Benefits Review Bd.*, 560 F.2d 797, 802 (7th Cir. 1977) (citing *John W. McGrath Corp.* v. *Hughes*, 289 F.2d 403, 405 (2d Cir. 1961) and *Todd Shipyards Corp.* v. *Donovan*, 300 F.2d 741 (5th Cir. 1962)).

Several considerations are common in this weighing process. Because pneumoconiosis is a progressive disease, a later qualifying X-ray, ventilatory study, or blood gas study generally deserves more weight than an earlier negative result. See *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 973. Similarly, an X-ray interpretation by a well-qualified "B"-reader is usually more persuasive than an X-ray reading by a general practitioner. See *Sharpless* v. *Califano*, 585 F.2d 664, 666-667 (4th Cir. 1978). Likewise, a medical conclusion regarding disability, offered under

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1054, 1058 (9th Cir. 1983) (rebutting party "must produce sufficient evidence").

Subsection (a)(4), is more probative if rendered by the claimant's treating physician and based on objective tests and examination results than if rendered by a doctor who has examined the claimant only once or if unsupported by objective evidence. See 20 C.F.R. 410.471.

Weighing the evidence at the presumption stage means that certain rebuttal methods are precluded: in particular, the fact "established" to invoke the presumption cannot be relitigated based on the same kind of evidence (see, *e.g.*, Pet. App. 39a n.5 (opinion of Phillips, J.)). For example, if a claimant has invoked the presumption under Subsection (a)(4), he has necessarily proven by a preponderance of the medical evidence the presence of a totally disabling respiratory or pulmonary impairment. The rebutting party may then attempt to show that the disability is not due to coal mine employment (Subsection (b)(3)) or that the claimant does not have pneumoconiosis (Subsection (b)(4)); the rebutting party may also attempt to use *non-medical* evidence to show that the miner is not disabled within the meaning of Subsections (b)(1) and (2). But the operator cannot seek to have *medical* evidence bearing on disability reweighed. Similarly, if a claimant has invoked the presumption under Subsection (a)(1), he has proven that he suffers from pneumoconiosis by the weight of the X-ray, biopsy, and autopsy evidence.[17] The

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[17] Contrary to the majority's conclusion below (Pet. App. 71a n.10 (opinion of Sprouse, J.)), if a claimant attempts to invoke the presumption under Subsection (a)(1) based on X-ray evidence, biopsy or autopsy evidence showing that the claimant does not suffer from pneumoconiosis would be considered before the presumption is invoked. See *Consolidation Coal Co.* v. *Chubb*, 741 F.2d at 974.

rebutting party can dispute disability or mine-relatedness but cannot seek to prove the nonexistence of pneumoconiosis under Subsection (b)(4) solely on the basis of evidence in this category.[18]

This scheme does not render the presumption irrebuttable. It simply allocates certain issues and evidence to the presumption stage and prohibits relitigation of the same issues based on the same evidence. A claimant who successfully invokes the presumption will not have "established" all elements of entitlement to benefits. Rather, for each of the categories of Subsection (a), the claimant proves only certain "basic facts" with only certain evidence (*e.g.*, pneumoconiosis under Subsection (a)(1) with X-ray, biopsy, and autopsy evidence). All the "presumed facts" (*e.g.*, disability and mine-relatedness in the case of Subsection (a)(1) presumption) remain open on rebuttal, as do the basic facts to the extent there is relevant evidence different in kind from that offered at the presumption stage. See Pet. App. 39a n.5 (opinion of Phillips, J.); note 18, *supra*.

The statute itself supports the foreclosure of certain issues in a presumption-rebuttal proof scheme. Under 30 U.S.C. 921(c)(4), a miner with 15 years' coal mine employment who "demonstrates the existence of a totally disabling respiratory or pulmonary impairment" is entitled to a presumption that he is totally disabled due to pneumoconiosis. That pre-

[18] Based on current medical knowledge, X-ray, biopsy, and autopsy evidence are today the only reliable diagnostic tools for identifying pneumoconiosis, and so the rebutting party cannot, as a practical matter, attempt to show that the miner does not suffer from some form of clinical pneumoconiosis. A physician's opinion on the source of the clinical pneumoconiosis, however, would certainly be admissible in rebuttal.

sumption may be rebutted, however, "only by establishing" that the miner does not have pneumoconiosis or that his disability did not arise from coal mine employment. See, *e.g.*, *Ansel* v. *Weinberger*, 529 F.2d at 310. See also *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. at 51 (Stewart, J., concurring in part and dissenting in part). The issue of disability is not open for relitigation on rebuttal. The interim presumption, under the Director's interpretation, works in much the same way.

d. The Director's interpretation of the proof scheme established by the interim regulations is not only a sensible reading of the regulatory language, but is also consistent with statutory requirements and congressional intent. The Director's construction plainly allows consideration of "all relevant evidence * * * where relevant" (30 U.S.C. 923(b)). The difference between the Director's interpretation and the Fourth Circuit's is not whether, but where, evidence is considered.

Moreover, the Director's interpretation gives full effect to the requirement of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2, 92 Stat. 96, that the Part C procedures may "not be more restrictive" than those applicable to Part B claimants (30 U.S.C. 902(f)(2)). As the legislative history plainly reveals, Congress believed that the Part B regulations satisfied its concerns that claimants receive the benefit of the doubt in this medically controversial area. See, *e.g.*, H.R. Rep. 95-151, 95th Cong., 1st Sess. 15 (1977); 124 Cong. Rec. 3426-3427 (1978) (remarks of Representative Perkins); *id.* at 3431. The statutory requirement thus clearly permitted the Secretary of Labor to promulgate regulations modeled on those applicable to Part B claims and to interpret them in parallel fashion.

In fact, that is what the Director's view of the interim regulation does. It has long been clear that all like-kind evidence is weighed in determining invocation of the presumption available to Part B claimants under 20 C.F.R. 410.490(b).[19] See, *e.g.*, *Vinston* v. *Califano*, 592 F.2d 1353, 1356-1359 (5th Cir. 1979); *Gober* v. *Matthews*, 574 F.2d 772, 775 (3d Cir. 1978); see also *Lawson* v. *Secretary*, 688 F.2d 436, 438-439 (6th Cir. 1982); *Hill* v. *Weinberger*, 430 F. Supp. 332 (E.D. Tenn. 1976); *Zirkle* v. *Weinberger*, 401 F. Supp. 945 (N.D. W.Va. 1975). Indeed, the Fourth Circuit itself, agreeing that X-ray evidence should be weighed in establishing entitlement to the Part B presumption, noted that "[w]e know of nothing in the Act * * * or * * * legislative history, to indicate that this fact is not *required* to be proved by a preponderance of the evidence as is every other fact

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[19] There is no difference relevant to this case between the Part B presumption regulation and the Part C interim presumption regulation. The Part B regulation provides, among other things, that a miner will be presumed totally disabled due to pneumoconiosis if "[a] chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis" or "[i]n the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or ventilatory disease" and "[t]he impairment * * * arose out of coal mine employment." The presumption is rebutted if "[t]here is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or "[o]ther evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work." 20 C.F.R. 410.490(b)

which is not presumed." *Sharpless* v. *Califano*, 585 F.2d at 667 (emphasis added).[20]

CONCLUSION

The Director does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

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[20] Although the APA, 5 U.S.C. 556(d), might support the Director's interpretation of his regulations (compare *Steadman* v. *SEC*, 450 U.S. 91, 96-102 (1981) (Section 556(d) imposes preponderance standard) with *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 403-404 n.7 (1983) (Section 556(d) "determines only the burden of going forward, not the burden of persuasion"), the APA does not require the Director's view. The burden of proof portion of Section 556(d) by its own terms does not apply when "otherwise provided by statute." Moreover, although the black lung statute (30 U.S.C. 932(a)) generally incorporates 33 U.S.C. 919(d), which in turn generally incorporates APA provisions, including Section 556(d), there is an express exception where "otherwise provided * * * by regulations of the Secretary" (30 U.S.C. 932(a)). Accordingly, the Secretary, and hence the Director, has the authority to depart from APA standards.

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